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No. 87-1191

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY H. MESSERLIAN AND
HENRY F. WOLKOWSKI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the specific intent element of 18 U.S.C. 242.

2. Whether an oral opinion of a government medical expert that was not disclosed to petitioner until after trial constituted either exculpatory or newly-discovered evidence that entitled petitioner to a new trial.

3. Whether there was sufficient evidence to support the jury's verdict that petitioners had conspired to obstruct justice by agreeing to obstruct foreseeable federal grand jury proceedings.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Berenyi v. *District Director*, 385 U.S. 630 (1967)	9
Brady v. *Maryland*, 373 U.S. 83 (1963)	5
Justice v. *Dennis*, 834 F.2d 380 (4th Cir. 1987)	7
Screws v. *United States*, 325 U.S. 91 (1945)	5, 7
United States v. *Calhoun*, 726 F.2d 162 (4th Cir. 1984)	7
United States v. *Currie*, 609 F.2d 1193 (6th Cir. 1979), cert. denied, 445 U.S. 928 (1980)	7
United States v. *Dise*, 763 F.2d 586 (3d Cir.), cert. denied, 474 U.S. 982 (1985)	7
United States v. *Glaze*, 643 F.2d 549 (8th Cir. 1981)	9
United States v. *Golden*, 671 F.2d 369 (10th Cir.), cert. denied, 456 U.S. 919 (1982)	7
United States v. *Harrison*, 671 F.2d 1159 (8th Cir.), cert. denied, 459 U.S. 847 (1982)	7
United States v. *McQueeney*, 674 F.2d 109 (1st Cir. 1982)	7
United States v. *Perlstein*, 126 F.2d 789 (3d Cir.), cert. denied, 316 U.S. 678 (1942)	9
United States v. *Shue*, 766 F.2d 1122 (7th Cir. 1985)	9
United States v. *Stokes*, 506 F.2d 771 (5th Cir. 1975)	7
United States v. *Young*, 470 U.S. 1 (1985)	9
Wisniewski v. *United States*, 353 U.S. 901 (1957)	10

Constitution, statutes and rule:

U.S. Const. Amend. XIV (Due Process Clause)	7
18 U.S.C. 242	2, 6, 7
18 U.S.C. 371	2

Statutes and rule—Continued:

	Page
18 U.S.C. 1623	2
42 U.S.C. 1983	7
Fed. R. Crim. P.:	
Rule 16	9
Rule 16(a)(1)(D)	6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-96a) is reported at 832 F.2d 778. The opinion of the district court (Pet. App. 97a-206a) is reported at 633 F. Supp. 1493.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1987. Petitions for rehearing were denied on December 4, 1987 (Pet. App. 207a, 209a). The petition for a writ of certiorari was filed on January 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a three-month jury trial in the United States District Court for the District of New Jersey, petitioner

Messerlian was convicted of depriving another of his civil rights, in violation of 18 U.S.C. 242; conspiring to obstruct justice, in violation of 18 U.S.C. 371; and making false declarations before a federal grand jury, in violation of 18 U.S.C. 1623. Petitioner Wolkowski was convicted of conspiracy to obstruct justice, in violation of 18 U.S.C. 371.[1] Petitioner Messerlian was sentenced to concurrent terms of ten years' imprisonment on the civil rights count, three years' imprisonment on the obstruction of justice count, and three years' imprisonment on the false declarations count. Wolkowski was sentenced to one year's imprisonment. Pet. App. 8a-9a.

1. This case arose from the death of an arrestee, Joseph Topolosky, while he was in police custody. The evidence at trial showed that on the evening of July 30, 1982, Topolosky parked his van in the left lane of the New Jersey Turnpike (Pet. App. 12a). A car carrying four persons collided with the rear of the van (*ibid.*). Three occupants of the car immediately went to the van and determined that Topolosky and his two children were not hurt (*id.* at 12a-13a).

Shortly thereafter, petitioner Messerlian, a New Jersey State Trooper, arrived with another trooper at the scene of the accident (Pet. App. 13a). They approached the van and, after awakening Topolosky and smelling alcohol on his breath, pulled him from the van, cuffed his hands behind his back, and escorted him to the police cruiser (*id.* at 13a-14a). While he was lying handcuffed alone in the back seat of the cruiser, Topolosky kicked out the car's left rear window (*id.* at 14a-15a). Messerlian responded by entering the cruiser and, according to witnesses who were only a few feet away, striking Topolosky three or four

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[1] Petitioner Wolkowski was found not guilty of the false declarations charge against him (Pet. App. 8a).

times on his face and neck with a heavy flashlight (*id.* at 15a). Afterwards, Topolosky lay motionless with blood running from his mouth and face (*id.* at 16a).

Several minutes later, Messerlian drove Topolosky back to the station. After seeing Topolosky's condition, a senior trooper called for an ambulance (Pet. App. 16a-17a). The victim was taken to the hospital, where he was pronounced dead on arrival (*id.* at 17a-18a).

Petitioner Wolkowski was the chief investigative officer at the police barracks at the time of the incident (Pet. App. 29a). Wolkowski interviewed Messerlian within minutes of Messerlian's arrival at the station, but Wolkowski made no written record of the conversation (*ibid.*). In addition, despite repeated requests, he refused to provide the hospital or the victim's family with any information about how Topolosky sustained his fatal injuries (*ibid.*). The next day Wolkowski supervised the taking of statements from eyewitnesses to the beating (*id.* at 30a-31a). Although each of the witnesses described Messerlian's beating of Topolosky, none of the interview reports mentioned the assault or the victim's physical condition (*id.* at 31a-32a). After the interviews, Wolkowski repeatedly told authorities that he had received no information about a beating, and he testifed before a federal grand jury that his interview report reflected all the information that he had obtained (*id.* at 33a).

Messerlian gave investigators contradictory accounts of the events on the turnpike (Pet. App. 35a-36a). Messerlian alternatively claimed that he never entered the cruiser, that he entered the cruiser only after the window was broken, and that he entered the cruiser before the window was broken when he saw Topolosky repeatedly banging his head against a briefcase and a radar unit that were located in the back seat (*id.* at 36a-37a). At trial, the government established that there was no briefcase or radar unit in

Messerlian's police car that night (*id.* at 38a). Messerlian also testified before a federal grand jury that he had not struck Topolosky (*ibid.*).

The attending physician in the emergency room, the medical examiner who performed the autopsy on the victim, and a forensic neuropathologist who examined the victim all testified for the government at trial. All three testified that Topolosky's death was a homicide that resulted from external blunt blows or impacts to the head and neck. They specifically ruled out the possibility that the fatality was due to natural causes, self-inflicted injuries, or the automobile accident. Pet. App. 18a-22a.

Petitioner Messerlian presented two medical experts who testified that Topolosky's death could have resulted from other causes, such as an aneurysm, the automobile accident, or self-inflicted blows that might have occurred if the victim had thrashed about in the back seat of the cruiser. One of the experts unequivocally stated that the fatal injuries could not have resulted from external blows from a flashlight, but the other stated that he could not rule out the possibility that those blows had fractured Topolosky's face. Pet. App. 24a-26a.

2. Following the jury's verdicts, petitioners filed motions for a new trial alleging, inter alia, that the government had failed to disclose the oral opinion of a medical expert who would have testified that Topolosky's fatal injuries were the result of the automobile accident. After holding a hearing at which the expert testified, the district court found that the government had not withheld any exculpatory information. The court found that the medical expert was not a credible witness and that he had lied under oath and had changed his opinion of the cause of the fatal injuries. Contrary to the expert's testimony, the court found that he had not told the government prior to trial that Topolosky's death had been caused by the

automobile accident; therefore, the court concluded, the government had not withheld any information that should have been disclosed under the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The court further found that the medical expert's current testimony regarding the cause of death was cumulative and would not have swayed the jury because both of the defense experts who testified at the trial had already stated that the victim could have sustained his fatal injuries in the automobile accident. Pet. App. 102a-103a, 131a-146a, 160a-178a.

3. On appeal, the court of appeals affirmed petitioners' convictions (Pet. App. 1a-96a). The court of appeals rejected (*id.* at 51a-59a) Messerlian's contention that the district court's instructions permitted the jury to convict merely upon a finding that he used excessive force or that he intended to strike the victim. According to the court (*id.* at 56a), the instructions as a whole "comport[ed] with the legal standard set forth in *Screws* [v. *United States*, 325 U.S. 91 (1945)]." The court further held (Pet. App. 60a-61a) that the district court correctly refused to instruct the jury that specific intent to inflict summary punishment is an element of the offense.

The court of appeals also rejected (Pet. App. 67a, 69a) petitioners' claim that the government failed to charge and to prove that petitioners intended to obstruct federal proceedings. The court noted (*id.* at 70a n.22) that the indictment charged and the government proved that petitioners "sought to 'prevent * * * law enforcement authorities of New Jersey and the United States,' from learning of the assault on Topolosky," and that the government properly relied on "overt acts designed to obstruct * * * both state and federal proceedings."

Finally, the court of appeals affirmed (Pet. App. 76a-84a) the district court's denial of petitioners' motion for a new trial based on the alleged failure of the govern-

ment to disclose an oral opinion of a medical expert witness. The court of appeals concluded (*id.* at 79a, 81a-82a, 84a) that the district court's findings—that the medical expert lied under oath and provided an opinion that was either "cumulative or incredible"—were "amply supported by the record." The court further concluded (*id.* at 83a-84a) that it did not need to determine whether Fed. R. Crim. P. 16(a)(1)(D) required disclosure of the expert's oral opinion because, in light of the cumulative and incredible nature of the testimony, the failure to disclose that opinion could not have prejudiced petitioners' substantial rights. Hence, in the court's view petitioners would not have been entitled to relief on that ground in any event.

ARGUMENT

1. Contrary to petitioner Messerlian's contention (Pet. 14-22), the district court's instructions did not permit the jury to convict him merely upon a showing that he used excessive force. As the court of appeals found (Pet. App. 56a-57a), "[t]he district court carefully defined for the jury the term 'willfulness' as requiring proof of an act 'done voluntarily and intentionally, and with the specific intent to do something [that] the law forbids.' * * * [T]he [instructions] did not permit the jurors to convict Messerlian solely on the basis of a conscious assault." They allowed the jury to convict "only if [it] found that Messerlian deprived Topolosky of a constitutional right and that Messerlian knew what he was doing was a violation of the law" (*id.* at 58a).

The court of appeals likewise correctly rejected petitioners' related contention (Pet. 18-19) that the district court erred in refusing to instruct the jury that Messerlian must have specifically intended to inflict summary punishment in order to violate 18 U.S.C. 242. As described in

Screws v. *United States*, 325 U.S. 91, 104 (1945) (plurality opinion), the only "specific intent required [by Section 242] is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or [the] laws of the United States or by decisions interpreting them." The scope of the federal statute is not limited to the right to be free from summary punishment. It is well settled that a law enforcement officer's intentional use of unreasonable, unwarranted, or excessive force, in violation of a victim's Fourteenth Amendment due process rights, can supply the basis for a conviction under 18 U.S.C. 242. See, *e.g.*, *United States* v. *McQueeney*, 674 F.2d 109, 113-114 (1st Cir. 1982); *United States* v. *Stokes*, 506 F.2d 771, 775 (5th Cir. 1975); *United States* v. *Currie*, 609 F.2d 1193 (6th Cir. 1979), cert. denied, 445 U.S. 928 (1980); *United States* v. *Harrison*, 671 F.2d 1159, 1162 (8th Cir.), cert. denied, 459 U.S. 847 (1982); *United States* v. *Golden*, 671 F.2d 369, 370 (10th Cir.), cert. denied, 456 U.S. 919 (1982); see also *United States* v. *Dise*, 763 F.2d 586, 590-592 (3d Cir.), cert. denied, 474 U.S. 982 (1985); *United States* v. *Calhoun*, 726 F.2d 162 (4th Cir. 1984).[2]

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[2] Contrary to petitioner Messerlian's intimation (Pet. 21), the Fourth Circuit's decision in *Justice* v. *Dennis*, 834 F.2d 380 (1987) (en banc), does not conflict with the court of appeals' decision in this case. The court in *Justice* ruled that the district court had properly instructed a jury that was considering a pretrial detainee's claim under 42 U.S.C. 1983 that a police officer's behavior must "shock the conscience" (834 F.2d at 380). But the issue in *Justice* was the proper standard for determining what constitutes "excessive force"; that case did not concern the very different question regarding the proper jury instructions on the issue of specific intent. Hence, there is no conflict between the decision in this case and the Fourth Circuit's decision in *Justice*.

Finally, Messerlian claims (Pet. 17) that he could not have acted with the requisite specific intent because he was intending to subdue the victim in furtherance of a legitimate law enforcement purpose. Messerlian's contention wrongly assumes, however, that an intent to subdue is exclusive of an intent to use excessive force. That Messerlian was entitled and intended to subdue the victim does not mean that he necessarily lacked the intent to deprive the victim of his constitutional right to be free from excessive force by beating him in the head and neck with a flashlight.

2. Petitioners contend (Pet. 22-28) that the court of appeals erred in affirming the district court's denial of a new trial motion that was based on the testimony of a medical expert, Dr. Aronson, who purportedly would have testified that Topolosky sustained his fatal injuries in the automobile accident. As the court of appeals found (Pet. App. 81a), however, "the district court's findings of fact with regard to the credibility and reliability of Dr. Aronson's testimony are not clearly erroneous," but instead are "amply supported by the record" (*id.* at 82a).

Following a hearing at which Dr. Aronson testified, the district court concluded (Pet. App. 168a) that his testimony was "cumulative" because other medical experts had already presented "detailed testimony regarding the possibility that Topolosky could have suffered serious injuries to this [*sic*] head and/or neck as a result of the motor vehicle accident. There were, in fact, several in-court demonstrations regarding the possible mechanisms of such injuries" (*id.* at 171a-172a). The district court also concluded that Dr. Aronson's testimony, even if not cumulative, was not likely to produce an acquittal because it was inconsistent with the physical evidence in the case, was "little more than an educated guess" (*id.* at 173a; see also *id.* at 166a-168a, 174a-177a), and it would have been

undercut by rigorous cross-examination. Further review of these findings of fact, upheld by the court of appeals, is not warranted. See *Berenyi* v. *District Director*, 385 U.S. 630, 635-636 (1967).

There is likewise no merit to petitioners' claim (Pet. 26-28), raised for the first time in the court of appeals (Pet. App. 76a-77a), that they should have been granted a new trial on the ground that the government's failure to disclose the oral opinion of the medical expert violated Fed. R. Crim. P. 16. As the court of appeals concluded (Pet. App. 83a-84a), failure to disclose the expert's opinion could not have "prejudice[d] [the] substantial rights of [petitioners]" because it was either "cumulative or incredible." See *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985). Moreover, although the court of appeals did not reach the question, it correctly noted that "[t]he two [c]ourts of appeals that have addressed this issue have concluded that Rule 16(a)(1)(D) only requires disclosure of written reports" (Pet. App. 83a n.24). See *United States* v. *Shue*, 766 F.2d 1122, 1135 (7th Cir. 1985); *United States* v. *Glaze*, 643 F.2d 549, 552 (8th Cir. 1981).

3. Finally, petitioners contend (Pet. 28-31) that the court of appeals should not have relied on its own prior decision in *United States* v. *Perlstein*, 126 F.2d 789 (3d Cir.), cert. denied, 316 U.S. 678 (1942), to uphold their convictions for conspiracy to obstruct justice. Petitioners maintain that *Perlstein*, in which the defendants were convicted of conspiracy to obstruct justice in anticipation of federal proceedings, is inapplicable because the alleged conspiracy in this case was directed at a state investigation, not a federal judicial proceeding. But as the court of appeals found (Pet. App. 66a-75a), in both this case and *Perlstein* the indictments charged and the evidence demonstrated that the conspiracies were directed at impeding all investigations by any law enforcement agency,

whether associated with the State of New Jersey or the United States. Moreover, in this case, as in *Perlstein*, the conspiracy continued through the period that the federal investigation was pending. In fact, two of the overt acts charged in the conspiracy count involved false testimony by the two petitioners and others before the federal grand jury that was investigating this case (see *id.* at 28a). Thus, contrary to petitioners' contention, the conspiracy in the instant case was aimed at both federal and state proceedings, thereby making this case factually indistinguishable from *Perlstein*. In any event, the alleged intracircuit conflict upon which petitioners rely does not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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